Supreme Court, U.S.
FILED

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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

MELODY DAVILA, *et al*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al*,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT
FOR THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a state court prohibit civil rights plaintiffs from having a hearing on the merits of their federal civil rights claim against individual law enforcement officers by imposing a heightened pleading standard?

May a state law requiring greater specificity in pleadings than is required under federal law be used to dismiss federal civil rights claims brought in state court?

LIST OF PARTIES

Petitioners Melody Davila, Jo Ann Davila, Carmen and Greg Davila were plaintiffs and appellants in the courts below. They are the daughter, wife, and parents, respectively, of Henry Davila, deceased. Respondents Michael Rodriguez, Jeffrey Lammers, and Michael Dimarzo were defendants and appellees in the courts below. They are deputy sheriffs employed by the County of Los Angeles.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Bach v. County of Butte
(1983) 147 Cal.App.3d 554, 195 Cal.Rptr. 268 . 8

Brown v. Western Railway of Alabama,
338 U.S. 294, 70 S.Ct. 105, 94 L.Ed 100
(1949) 8

Conley v. Gibson,
355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) . 7

Elliott v. Perez,
751 F.2d 1472 (5th Cir., 1985) 6, 7

Felder v. Casey,
487 U.S. 131, 108 S.Ct. 2302 (1988) 8

Gomez v. Toledo,
(1980) 446 U.S. 635, 100 S.Ct. 1920, 64
L.Ed.2d 572 7

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,
___ U.S. ___, 113 S.Ct. 1160, 112 L.Ed.2d
517 (1993) 6

Newton v. County of Napa
(1990) 217 Cal.App.3d 1551, 266 Cal.Rptr. 262 7

Williams v. Horvath
(1976) 16 Cal.3d 834, 129 Cal.Rptr. 453 8

United States Constitution:

Fourth Amendment 4

Fourteenth Amendment 4

United States Statutes:

28 U.S.C. § 1257(a) 1

42 U. S. C. §1983: 2, 3, 6-8

Federal Rules:

Rule 8, Federal Rules of Civil Procedure 6

Rule 8(a), Federal Rules of Civil Procedure 3

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

MELODY DAVILA, *et al*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al*,

Respondents.

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the California Supreme Court which was based upon the unpublished opinion of the California Court of Appeal.

OPINION BELOW

The opinion of the California Court of Appeal appears in the Appendix [Apx], B. The California Supreme Court denied review. Apx. A.

JURISDICTION

The judgment and opinion of the California Court of Appeal was filed on October 11, 1994. A timely petition for review in the California Supreme Court was denied on January 4, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U. S. C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 8(a), Federal Rules of Civil Procedure:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

STATEMENT OF THE CASE

Petitioners, the sole heirs and representatives of Henry Davila, filed a complaint for damages alleging a state law claim for wrongful death[1] and claims under 42 U.S.C. §1983 for the deprivation of their right to a familial relationship with Henry Davila and for his deprivation of life.

Petitioners twice amended their original complaint

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[1]The wrongful death claim has been dismissed by the state court by virtue of its ruling that the deputy sheriffs are insulated from liability by state law immunity.

pursuant to rulings that are not material here. Each amendment added further factual specificity. When the trial court again ruled that the facts alleged in petitioners' second amended complaint were insufficient to state a claim, petitioners declined to amend and instead appealed.

The California Court of Appeal ruled that the civil rights claims lacked "the factual specifity required by the courts in a civil rights action." The court said, "plaintiffs merely have pleaded that the individual defendants acted with deliberate indifference toward decedent's life." The second amended complaint is found at Apx. C.

The factual allegations rejected as insufficient were as follows. See Apx. C, pages 6-7.

> At or about the aforementioned time, date and place, defendants RODRIGUEZ, DIMARZO, LAMMERS, and DOES 1-10 deprived plaintiffs[2] of rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution in that defendants arrested and detained and imprisoned decedent for public intoxication on the grounds that he was so intoxicated that he was unable to care for his own safety or the safety of others; defendants

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[2]The allegations stating decedent's claim for violation of his constitutional right to life are identical except the claim is based on the Fourth and Fourteenth Amendments to the United States Constitution.

were called to the scene because of decedent's inebriated state, and they assumed complete custody and control of decedent by handcuffing him and locking him in their patrol car so that no other person could render assistance to decedent who was extremely intoxicated; having established a special relationship with decedent, defendants took him from Motel 6, the location where he had been residing and was known to other occupants, and although they knew that his roommate was present and able to care for him, defendants transported him to a location at and near 12056 Whittier Boulevard in the City of Whittier, a heavily-traveled traffic artery, where, notwithstanding his obvious inability to care for his own safety or the safety of others, defendants knowingly, intentionally and with reckless disregard of and deliberate indifference to the rights of plaintiffs, defendants released and ejected decedent from their patrol car and abandoned him notwithstanding his obvious inability to care for his own safety or the safety of others, and knowing that decedent was so disabled, they placed him in a position of peril and increased the risk of harm to him; and as a proximate result thereof, decedent was killed by a passing automobile shortly thereafter.

REASON FOR GRANTING THE WRIT

The State Court Should Not Be Permitted to Dispose of Federal Civil Rights Claims by Imposing Heightened Pleading Requirements That Are Inconsistent With Federal Pleading Requirements.

There are two questions to be addressed in deciding what standard should be applied in judging the sufficiency of the allegations in the second amended complaint. First, does federal law impose more stringent pleading requirements on civil rights plaintiffs than it does on other plaintiffs? Second, can the pleading requirements of state law be used to impose a greater burden on a civil rights plaintiff in state court than would be required of that plaintiff in federal court? It is respectfully submitted that the answer to both questions is no.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), this Court rejected the argument that federal law imposes a "heightened" pleading standard on a plaintiff in federal court who alleges a claim against a municipality for violation of civil rights. Noting that the system of "notice pleading" prescribed by Rule 8 of the Federal Rules of Civil Procedure requires nothing more than "a short and plain statement of the claim" the Court reversed the dismissal of complaints that were deemed insufficient. The Court expressly criticized *Elliott v. Perez*, 751 F.2d 1472 (5th Cir., 1985) for adopting a more demanding rule for pleading a complaint under §1983 than for pleading other kinds of claims for relief.

The California Court of Appeal improperly applied a heightened standard when it held that petitioners had not complied with the factual specificity required in civil rights cases. Apx. B-10. The court relied on *Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 266 Cal.Rptr. 262, which in turn relied on the now discredited opinion in *Elliott, supra.* That misplaced reliance is being used to deprive petitioners of a trial on the merits of their claims.

To state a claim under §1983, petitioners need only allege (1) a violation of a constitutional right (2) by a person acting under color of law. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572. A §1983 action may be dismissed for failure to state a claim only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

The dismissal of petitioners' complaint should be reversed because the state court used an impermissible standard in determining whether petitioners had stated a claim.

The second aspect of the applicable pleading standard is whether California's system of "code pleading" can be used to impose a more stringent pleading standard on civil rights plaintiffs in state court than is required of civil rights plaintiffs in federal court.

The California Court of Appeal acknowledged that federal law should be applied in determining the sufficiency of a civil rights pleading. However, it is clear that if the court had

applied federal law, it could not have dismissed petitioners' claims.

Moreover, in *Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 561, 195 Cal.Rptr. 268, 272, the court noted that California courts have assumed that California pleading law should be applied to test the adequacy of a complaint brought under the federal civil rights act. The court recited the general rule that state law controls in matters of practice and procedure where an action founded on a federal statute is brought in state court unless there is contrary federal law. The court ultimately held that federal law should be used to determine the sufficiency of a claim brought under 42 U.S.C. §1983 *(Ibid., p. 563)* but the discussion manifests a lack of uniformity in the courts on this question.

The general rule articulate in *Bach* conflicts with this Court's decision in *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302 (1988) that states may not use procedural devices that conflict with the remedial objectives of §1983 or that produce different outcomes based solely on whether the claim is filed in state or federal court. In *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed 100 (1949) the Court held that local pleading rules are such a device that cannot be permitted to infringe on federal rights. The California Supreme Court has recognized that state law may not be used to frustrate the federal purposes underlying §1983 by imposing substantive limitations couched in procedural language (*Williams v. Horvath* (1976) 16 Cal.3d 834, 841, 129 Cal.Rptr. 453) but it declined to adhere to it in this case.

This Court should eliminate any conflict or ambiguity in the law governing the sufficiency of pleadings in §1983 actions brought in state court by unequivocally rejecting a heightened pleading standard under federal or state law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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Attorneys for petitioners

Second Appellate District, Division One, No. B079467
S043421

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MELODY DAVILA Et Al., Appellants

v.

COUNTY OF LOS ANGELES Et Al., Respondents

SUPREME COURT
FILED
JAN 4 - 1995
Robert Wandruff Clerk
H CRUZ
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Petition for review DENIED.

LUCAS

Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MELODY DAVILA et al.,	)	BO62294
	)	(Super.Ct.No. VC002724)
Plaintiffs and Appellants,	)	
	)	
v.	)	
	)	
COUNTY OF LOS ANGELES et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from an order of the Superior Court of Los Angeles County, James W. Edson, Judge. Reversed and remanded with directions.

Manes & Watson and Carol A. Watson, for Plaintiffs and Appellants.

De Witt W. Clinton, County Counsel and Anthony P. Serritella and Nohemi G. Ferguson, for Defendants and Respondents.

We reverse an order of dismissal entered after the trial court sustained a demurrer to a first amended complaint without leave to amend, and remand with directions to permit amendment.

FACTS

By their first amended complaint for damages (filed after demurrers were sustained to their original complaint), Melody, Jo Ann, Carmen and Greg Davila sued Los Angeles county Deputy Sheriffs Michael Rodrigez, Michael Dimarzo and Jeffrey Lammers for civil rights violations (42 U.S.C. § 1983) and wrongful death (Code Civ. Proc., § 377) and alleged the following facts.

Henry G. Davila was Jo Ann's husband, Melody's father, and the son of Carmen and Greg Davila. On March 10, 1990, Defendants arrested Henry Davila "and removed him from a [motel] where they knew he resided and was known to other occupants, and although they knew that his roommate was present and able to care for him," transported him "to a different and extremely hazardous location," and with "reckless disregard" later "ejected him from their patrol car notwithstanding his obvious inability to care for his own safety," as a proximate result of which he was killed by a

passing automobile.[3] By reason of these acts, Davila was "deprived of his life and thereby sustained economic and hedonic [sic] losses" and Plaintiffs incurred funeral and other expenses.

Defendants' demurrer to the amended pleading was sustained without leave to amend and this appeal followed.

DISCUSSION

Plaintiffs contend that Defendants owed a duty of due care to decedent and to his heirs, that Defendants are not immune, and that causes of action for wrongful death and civil rights violations have been sufficiently pleaded. We do not agree, but we do believe that leave should be granted to give Plaintiffs one more opportunity to amend their pleading.

When the trial court sustained the demurrer to the original complaint, it did so without leave to amend the wrongful death cause of action but with leave to amend the civil rights cause of action. Based on the allegations that Davila was "arrested" and then released under circumstances where he was exposed to danger, the trial court found the

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[3] Although the reason for Davila's inability to care for himself was omitted from the first amended complaint, the original complaint explained that he was intoxicated.

County of Los Angeles (which was named in the original complaint but dropped form the first amended pleading) and the deputies were immune under sections 820.2 and 846 of the Government Code.[4] As to the civil rights cause of action, the trial court found the allegations were too conclusory and granted leave to amend to allege specific facts showing the Defendants acted recklessly.

For reasons we do not understand, Plaintiffs' counsel amended the complaint by eliminating facts relevant to both causes of action (e.g., the fact that Davila was intoxicated). And notwithstanding the trial court's order sustaining the demurrer to the wrongful death cause of action without leave to amend, the first amended complaint continued to plead two separate causes of action, the first entitled "Decedent's claim vs. all defendants" instead of "wrongful death" and the second entitled "Plaintiffs' claim vs. all defendants." Facts showing reckless conduct are still not alleged.

On the immunity issue, all of the cases cited by the

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[4] Unless otherwise stated, all section references are to the Government Code. Section 820.2 immunizes public employees when an injury results from an act or omission which was the result of the employee's exercise of discretion. Section 846 immunizes peace officers when an injury is caused by their failure to retain an arrested person in custody.

parties are factually distinguishable. (See Duarte v. City of San Jose (1980) 100 Cal.App.3d 648, 653-654; Truong v. James (1985) 168 Cal.App.3d 833, 835; Harris v. Smith (1984) 157 Cal.App.3d 100; Stout v. City of Porterville (1983) 148 Cal.App.3d 937, 946-948; Mann v. State of California (1977) 70 Cal.App.3d 773, 778; Winterburn v. City of Pomona (1986) 186 Cal.App.3d 878, 882.) Our initial review of the record in this case left us with the nagging feeling (although our own cursory review has revealed no pertinent authority) that there may be some limitation on the section 846 immunity. Our consideration of this issue was hampered by the absence of any meaningful factual information and we therefore asked counsel, at oral argument, to tell us what had happened to Davila.

What we learned as a result of this inquiry is that Davila may not have actually been arrested at all. According to the police report of the accident (which counsel for the County lodged after argument and which both attorney stipulated we might consider in reaching our decision), this is what happened. Marsha Lee Archer's car struck and killed Davila when he "jumped" from the bushes at the side of Whittier Boulevard in front of Archer's oncoming car. Preliminary reports from the hospital indicated that, at the time of his death, Davila's blood alcohol level was

approximately .11 percent and he tested positive for cocaine, heroin and barbiturates.

Davila's mother and father directed the officers who investigated the accident to a motel where Davila had been staying with a friend, a man later identified as Albert Jimenez. Jimenez told the officers that Davila had been out "partying" the night before the accident and, on his return, had "appeared to be very drunk." Davila slept for awhile, then went out for awhile and returned to the motel in the late afternoon. Davila was "very irate" and began collecting his personal belongings. Jimenez' efforts to calm Davila were unsuccessful. Davila left the room, began pounding on the doors and windows of adjacent rooms, and was ultimately subdued and restrained by the motel's manager.

According to Jimenez, he watched "two deputy sheriffs approach Davila placing him under arrest and handcuffing him." Davila was placed in a police vehicle and taken from the motel. According to the manager of the motel, a "deputy arrested [Davila] and placed him in the patrol vehicle." The manager described Davila as "very inebriated" and "also very irate and combative."

According to a "memo" from the deputies involved at

the motel, when Deputies Michael Rodrigez and Michael Dimarzo arrived at the motel, Deputy Jeffrey Lammers had detained Davila because he had been involved "in a verbal altercation with another male [but] no crime had occurred. Rodrigez indicated that he could smell an odor of alcohol on [Davila's] breath but did not feel he was under the influence to a degree that it impaired his normal behavior. Rodrigez went on to say that [Davila] asked for a ride home to an address a[t] 7337 Whittier Ave. . . . Deputies Rodrigez and Dimarzo transported [Davila] to the area of Whittier Blvd. and Penn St., leaving him at that intersection at approx. 1805 hours. They dropped him off at that intersection as [Davila] informed them that it would be embarrassing if his wife saw them bring him home."

Although the police report leaves a lot of questions unanswered, it does suggest that Davila might not have been actually arrested. It also shows the evidence is wholly inconsistent about how intoxicated Davila was at the time he was taken from the motel.

Because these facts were not pleaded, the parties have not addressed the question whether the immunity rules apply if Davila was not, in fact, arrested. And they have not addressed the question whether particularly egregious

conduct by the officers might give rise to an exception to the immunity otherwise available to the officers. For example, if Davila was an intoxicated as some of the evidence suggests, reasonable minds might conclude that the officers discarded their cloak of immunity when they dropped him off at a busy intersection. On the other hand, the immunity might still be available, for policy reasons, without regard to the nature of the officers' conduct or whether Davila was actually arrested.

These issues were not developed by the County or the officers because the relevant facts were not pleaded. Despite our questioning at oral argument, it remains unclear to us why Plaintiffs' counsel failed to plead these facts and pursue all available theories and it is impossible for us to understand why the critical fact of intoxication was dropped from the first amended complaint. Moreover, the responses by Plaintiffs' counsel at argument suggest she does not understand that different rules (and different exceptions) might apply if, in fact, Davila was not arrested. For these reasons, basic concepts of fairness compel us to give Plaintiffs one more opportunity to amend to allege all of the available facts and theories, after which the County and the officers may, of course, assert their claims of immunity and all other defenses. The true legal merit of Plaintiffs' claims can then be considered. (See England v. Christensen (1966)

243 Cal.App.2d 413, 435 [remand proper for trial court to receive such additional material as it may deem necessary or advisable to determine merits of claims involved in case].)

DISPOSITION

The orders sustaining the demurrers to the wrongful death and civil rights causes of action are reversed and the matter is remanded to the trial court with directions to enter a new order sustaining the demurrers to the original causes of action with leave to amend and to afford Plaintiffs an opportunity to allege all available facts and theories against the County and the individual officers. The parties are to pay their own costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

ORGEGA, J.

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MAR 1 9 1993

SOUTHEAST DISTRICT.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MELODY DAVILA, JO ANN DAVILA, CARMEN DAVILA, GREG DAVILA, Plaintiffs, vs. COUNTY OF LOS ANGELES, a public entity, MICHAEL RODRIGUEZ, MICHAEL DIMARZO, JEFFREY LAMMERS, individually and as deputy sheriffs, DOES 1-10, inclusive, Defendants.	CASE NO: VC 002724 SECOND AMENDED COMPLAINT FOR DAMAGES 1. Wrongful Death, CCP§377 2. Violation of Decedent's Federal Civil Rights 3. Violation of Plaintiffs' Federal Civil Rights

First Cause of Action
Wrongful Death
(All Plaintiffs vs. All Defendants)

1. Plaintiff MELODY DAVILA is, and at all times

material herein was, the natural daughter of decedent HENRY G. DAVILA.

2. Plaintiff JO ANN DAVILA is, and at all times material herein was, the lawful wife of decedent HENRY G. DAVILA.

3. Plaintiffs GREG and CARMEN DAVILA are, and at all times material herein were, the father and mother, respectively, of decedent HENRY G. DAVILA [hereinafter referred to as decedent.]

4. Plaintiffs are the sole heirs and personal representatives of decedent and they sue herein as individuals and as personal representatives of decedent.

5. The true names of defendants DOE 1-10 are not now known to plaintiffs who therefore sue said defendants by such fictitious names, but upon ascertaining the true name of a Doe defendant, plaintiffs will amend this complaint, or seek leave to do so, by substituting same for such fictitious name.

6. Defendant COUNTY OF LOS ANGELES is, and at all times material herein was, a public entity duly organized and existing as such under the laws of and in the State of California.

7. At all times material herein, defendants MICHAEL RODRIGUEZ, Ser.No. 225772, MICHAEL DIMARZO, Ser.No. 218485, JEFFREY LAMMERS, Ser.No.

219153, and DOES 1-10 were each duly appointed, qualified and acting deputy sheriffs employed as such by defendant COUNTY OF LOS ANGELES and at all times herein mentioned, were each acting in the course and scope of such employment and under color of law.

8. At all times material herein, each defendant was acting as the employee, agent, representative and officer of every other defendant, and within the course and scope of such employment and agency.

9. On August 23, 1990, plaintiffs presented a claim for damages to the Board of Supervisors of defendant COUNTY OF LOS ANGELES, pursuant to Government Code §910 et seq., and in substantial compliance therewith. Said claim was denied on or about October 26, 1990.

10. The acts, omissions and events herein described and complained of occurred on or about March 10, 1990 at approximately 6:00 to 7:00 P.M. beginning at Motel 6, located at and near the intersection of Pioneer and Washington Boulevards in the County of Los Angeles, California, and subsequently at and near 12056 Whittier Boulevard in the City of Whittier, California.

11. At said time, date and place, decedent was arrested and detained and imprisoned by defendants for public intoxication on the grounds that he was so intoxicated that he was unable to care for his own safety or the safety of others; defendants were called to the scene because of decedent's inebriated state, and they assumed complete

custody and control of decedent by handcuffing him and locking him in their patrol car so that no other person could render assistance to decedent who was extremely intoxicated; having established a special relationship with decedent, defendants took him from Motel 6, the location where he had been residing and was known to other occupants, and although they knew that his roommate was present and able to care for him, defendants transported him to a location at and near 12056 Whittier Boulevard in the City of Whittier, a heavily-traveled traffic artery, where, notwithstanding his obvious inability to care for his own safety or the safety of others, defendants knowingly, intentionally and negligently released and ejected him from their patrol car and abandoned him notwithstanding his obvious inability to care for his own safety or the safety of others, and knowing that decedent was so disabled, they placed him in a position of peril and increased the risk of harm to him; and as a proximate result thereof, decedent was killed by a passing automobile shortly thereafter.

12. By reason of the aforedescribed acts and omissions of defendants, plaintiffs have been and will forever be deprived of the love, affection, society, companionship, support and pecuniary benefits of decedent, and of their familial relationship with him, all to plaintiffs' damage in an amount to be proved.

13. By reason of the aforedescribed acts and omissions of defendants, plaintiffs were required to and did incur funeral, burial, and incidental expense in an amount as proved.

Second Cause of Action

Violation of Decedent's Civil Rights, U.S.C. §1983

(All Plaintiffs vs. All Individual Defendants)

14. Plaintiffs replead each and every allegation contained in paragraphs 1 through 10, and by this reference, incorporate the same herein and make each a part hereof.

15. At or about the aforementioned time, date and place, defendants RODRIGUEZ, DIMARZO, LAMMERS, and DOES 1-10 deprived decedent of rights, privileges and immunities guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution in that defendants arrested and detained and imprisoned decedent for public intoxication on the grounds that he was so intoxicated that he was unable to care for his own safety or the safety of others; defendants were called to the scene because of decedent's inebriated state, and they assumed complete custody and control of decedent by handcuffing him and locking him in their patrol car so that no other person could render assistance to decedent who was extremely intoxicated; having established a special relationship with decedent, defendants took him from Motel 6, the location where he had been residing and was known to other occupants, and although they knew that his roommate was present and able to care for him, defendants transported him to a location at and near 12056 Whittier Boulevard in the City of Whittier, a heavily-traveled traffic artery, where, notwithstanding his obvious inability to care for his own safety or the safety of others, defendants knowingly, intentionally and with reckless disregard of and deliberate indifference to

the rights of decedent, including his right to life, defendants released and abandoned and ejected him from their patrol car notwithstanding his obvious inability to care for his own safety or the safety of others, and knowing that decedent was so disabled, they placed him in a position of peril and increased the risk of harm to him; and as a proximate result thereof, decedent was killed by a passing automobile shortly thereafter.

16. By reason of the aforedescribed acts and omissions of defendants, decedent, whose damages are claimed through his personal representatives, was deprived of his life and thereby sustained economic and hedonic losses, all to decedent's damage in an amount to be proved.

17. By reason of the aforedescribed acts and omissions of defendants, plaintiffs were required to retain an attorney to institute and prosecute the within action, and to render legal assistance to plaintiffs that they might vindicate the loss and impairment of their and decedent's rights, and by reason thereof, plaintiffs request payment by defendants of a reasonable sum for attorney's fees pursuant to 42 U.S.C. Section 1988.

Third Cause of Action

Violation of Plaintiffs' Civil Rights, U.S.C. §1983

(All Plaintiffs vs. All Individual Defendants)

18. Plaintiffs replead each and every allegation contained in paragraphs 1 through 12, and 17, and by this reference, incorporate the same herein and make each a part

hereof.

19. At or about the aforementioned time, date and place, defendants RODRIGUEZ, DIMARZO, LAMMERS, and DOES 1-10 deprived plaintiffs of rights, privileges and immunities guaranteed by the Fourteenth Amendment to the United States Constitution in that
defendants arrested and detained and imprisoned decedent for public intoxication on the grounds that he was so intoxicated that he was unable to care for his own safety or the safety of others; defendants were called to the scene because of decedent's inebriated state, and they assumed complete custody and control of decedent by handcuffing him and locking him in their patrol car so that no other person could render assistance to decedent who was extremely intoxicated; having established a special relationship with decedent, defendants took him from Motel 6, the location where he had been residing and was known to other occupants, and although they knew that his roommate was present and able to care for him, defendants transported him to a location at and near 12056 Whittier Boulevard in the City of Whittier, a heavily-traveled traffic artery, where, notwithstanding his obvious inability to care for his own safety or the safety of others, defendants knowingly, intentionally and with reckless disregard of and deliberate indifference to the rights of plaintiffs, defendants released and ejected decedent from their patrol car and abandoned him notwithstanding his obvious inability to care for his own safety or the safety of others, and knowing that decedent was so disabled, they placed him in a position of peril and increased the risk of harm to him; and as a proximate result thereof,

decedent was killed by a passing automobile shortly thereafter.

20. By reason of the aforedescribed acts and omissions of defendants, plaintiffs, in their individual capacities, have been and will forever be deprived of the love, affection, society, companionship, support and pecuniary benefits of decedent, and of their familial relationship with him, all to plaintiffs' damage in an amount to be proved.

WHEREFORE, plaintiffs pray for damages as follows:

1. General damages for plaintiffs' loss in a sum to be proved;
2. General damages for decedent's loss in a sum to be proved;
3. Funeral, burial, and incidental expense, as proved;
4. Loss of income and financial support, as proved;
5. Costs of litigation;
6. Reasonable attorney's fees;
7. Such other and further relief as the Court deems appropriate and just.

DATED: March 17, 1993

MANES & WATSON

By_____
CAROL A. WATSON
Attorneys for Plaintiffs

Supreme Court, U.S.
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JUN 8 1995
OFFICE OF THE CLERK

(2)

No. 94-1770

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

MELODY DAVILA, *et al*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al*,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT
FOR THE STATE OF CALIFORNIA

SUPPLEMENTAL APPENDIX

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

MELODY DAVILA, *et al*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al*,

Respondents.

Petitioners respectfully submit this Supplemental Appendix to replace the Appendix B attached to their Petition.

Hugh R. Manes, *Counsel of Record*
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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MELODY DAVILA et al.,	B079467
	(Super.Ct.No. VC002724)
Plaintiffs and Appellants,	
v.	
COUNTY OF LOS ANGELES et al.,	
Defendants and Respondents.	

COURT OF APPEAL - SECOND DIST.
FILED
OCT 11 1994
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County, Daniel S. Pratt, Judge. Affirmed.

Manes & Watson and Carol A. Watson for Plaintiffs and Appellants.

DeWitt W. Clinton, County Counsel, Law Offices of Anthony P. Serritella, Anthony P. Serritella, and Nohemi G. Ferguson for Defendants and Respondents.

Melody, Jo Ann, Carmen and Greg Davila ("plaintiffs"), the spouse, daughter and parents of Henry Davila ("Decedent"), appeal from the order of dismissal entered following the sustaining of a demurrer to their second amended complaint. We affirm.

STANDARD OF REVIEW

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

However, where leave to amend has been granted and the plaintiff declines to file an amended complaint, it is presumed that the plaintiff has pleaded the case as favorably as possible, and all ambiguities in the pleading will be construed against the plaintiff. (Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal.App.3d 802, 816.)

BACKGROUND

On March 19, 1993, plaintiffs filed a second amended complaint against the County of Los Angeles and three of its deputy sheriffs, Michael Rodriguez, Michael DiMarzo, and Jeffrey Lammers (collectively "defendants"). Therein, plaintiffs alleged that, on March 19, 1990, defendants were called to the Motel 6 where decedent had been residing. Plaintiffs further asserted that "decedent was arrested and detained and imprisoned by defendants for public intoxication on the grounds that he was so intoxicated that he was unable to care for his own safety or the safety of others." The deputies handcuffed decedent and placed him in their patrol car. The deputies drove decedent to the City of Whittier, where they released him. After the deputies left, decedent walked into the street and was struck and killed by a passing automobile. Plaintiffs alleged causes of action for wrongful death against all defendants and violations of decedent's and plaintiffs' civil rights (41 U.S.C. § 1983) against the individual defendants.

On May 3, 1993, defendants demurred to the wrongful death cause of action on the grounds, inter alia, that defendants did not owe a duty of care to decedent and that defendants were immune from liability. with regard to the causes of action for violation of civil rights, defendants claimed, in part, that plaintiffs failed to plead sufficient facts to allege conduct more egregious than mere negligence.

On May 27, 1993, the trial court sustained defendants' demurrer with leave to amend. When plaintiffs failed to file an amended complaint within the allotted time, defendants obtained an order of dismissal pursuant to Code of Civil Procedure section 581, subdivision (f)(2).

ISSUES

On appeal, plaintiffs assert that the trial court erred in sustaining defendants' demurrer since they have sufficiently pleaded causes of action for wrongful death and violations of civil rights. Specifically, with regard to the cause of action for wrongful death, plaintiffs claim that defendants owed a duty of care to decedent and defendants' conduct falls outside the parameters of the statutory immunities. With regard to the causes of action for violations of civil rights, plaintiffs argue that the facts pleaded demonstrated that the individual defendants acted with "deliberate indifference" toward decedent's safety.

DISCUSSION

1. Wrongful Death

Plaintiffs assert that the issue of whether a special relationship, and hence a duty of care, is created when someone is arrested is one of first impression. Defendants, on the other hand claim that "Government Code § 846 has been upheld in several cases involving a question of duty to an intoxicated person who was injured after he/she was arrested and thereafter released, or to the victims of such intoxicated persons."[1] However, none of the cases cited by defendants specifically analyzed the issue of duty under circumstances where the intoxicated person is handcuffed and taken into custody.[2] In

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[1] Government Code section 846 provides: "Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody."

[2] In Stout v. City of Porterville (1983) 148 Cal.App.3d 937, a police officer detained the plaintiff and inquired about his sobriety. The officer did not arrest the plaintiff, who was later struck by a passing vehicle. The Stout court held that no special relationship or duty was created merely by the detention or by the officer's inquiries concerning the plaintiff's sobriety.

In Harris v. Smith (1984) 157 Cal.App.3d 100, a police officer stopped a car for speeding. Detecting alcohol on the breath of the driver, the officer administered three field sobriety tests, which the driver passed. Believing that he did not have probable cause to arrest the driver, the officer let him go. Twenty minutes later, the driver struck the plaintiff's vehicle. The Harris court held that no duty was owed, noting that the officer "did not create the peril to plaintiff; he took no affirmative action which

fact, the closest case is Duarte v. City of San Jose (1980) 100 Cal.App.3d 648. There, a police officer arrested a person for driving while intoxicated. The arrestee was placed in the patrol car but was not handcuffed. When the officer left the patrol car unattended, the arrestee ran off the road and struck the plaintiff. The Duarte court found that a duty of care existed toward the plaintiff based on the officer's duty to operate his vehicle with due care.

It is obvious from our reading of the cases that there is not definitive precedent on the issue of duty under the circumstances of the instant case. However, under the facts as

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contributed to, increased or changed the risk that otherwise existed; he did not voluntarily assume any responsibility to protect plaintiff; and he made no statement or promise to induce plaintiff's reliance. Assuming, arguendo, plaintiff or any other member of the motoring public was a reasonably foreseeable victim, that fact alone is not enough to establish a special relationship with [the officer] imposing on him a duty to use due care. [Citation.]" (Id. at p. 105)

In Truong v. James (1985) 168 Cal.App.3d 833, the plaintiff, while intoxicated, drove his car into the center divider of a freeway. The California Highway Patrol officers who investigated the accident told a tow truck operator to drive the plaintiff home and, should plaintiff become belligerent, to order him out of the truck. After the plaintiff became unmanageable, the tow truck operator ordered him out of the truck. The plaintiff ran into traffic and was struck by three vehicles. The Truong court held that the officers did not order the plaintiff to do anything and his decision to enter traffic "was not a peril created by the officers, i.e., it was due solely to his voluntarily intoxicated condition." (Id. at p. 835)

pleaded by plaintiffs, we conclude that a duty of care was owed to decedent at least for the period that he was handcuffed in the patrol car. We therefore turn to the issue of whether, once decedent was released from custody, the governmental immunity statutes operated to shield defendants from liability.[3]

As noted, Government Code section 846 provides: "Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody."

Penal Code section 647 provides, in pertinent part: "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

" . . . . . .

"(f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the

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[3] Although the trial court rendered its ruling on the basis of duty, rather than immunity, "[w]hen a plaintiff elects not to amend a complaint after a demurrer has been sustained with leave to amend, if the complaint is objectionable on any ground raised by the demurrer, the judgment of dismissal must be affirmed. [Citations.]" (Hooper v. Deukmejian (1981) 122 Cal.App.3d 987, 994.)

influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

"(ff) When a person has violated subdivision (f) of this section, a peace officer, if he or she is reasonably able to do so, shall place the person, or cause him or her to be placed, in civil protective custody."

Penal Code section 849, subdivision (b), states: "Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

" . . . . . .

"(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable."

Finally, Government Code section 820.2 states: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

It is clear from the facts alleged in plaintiffs' second amended complaint that decedent was arrested pursuant to Penal Code section 647, subdivision (f), and later released pursuant to the discretion which is vested in police officers by Penal Code section 849, subdivision (b). This case falls squarely

within the immunity statutes quoted above. Moreover, decedent's injuries were sustained as a result of his voluntarily intoxicated state, not because the officers released him. (Truong v. James, supra, 168 Cal.App.3d at p. 835.)

Accordingly, we conclude the trial court properly sustained defendants' demurrer to the cause of action for wrongful death.

2. Civil Rights Violations

In the second amended complaint, after restating the factual allegations underlying the wrongful death cause of action, plaintiffs alleged that decedent's and plaintiffs' civil rights were violated by the individual defendants. Plaintiffs asserted that the individual defendants acted "knowingly, intentionally and with reckless disregard of and deliberate indifference to the rights of decedent, including his right to life . . . ."

"'To state a claim under [42 U.S.C.] § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.' [Citation.]" (Bullock v. City and County of San Francisco (1990) 221 Cal.App.3d 1072, 1088.) California courts apply federal law in determining whether a plaintiff has sufficiently pleaded a civil rights violation. (Ibid.) Although federal law mandates that complaints be construed liberally

(ibid.), merely conclusional allegations are insufficient. (Bach v. County of Butte (1983) 147 Cal.App.3d 554, 564.)

In the second amended complaint, plaintiffs merely have pleaded that the individual defendants acted with deliberate indifference toward decedent's life. Plaintiffs have not complied with the factual specificity required by the courts in a civil rights action. (See Newton v. County of Napa (1990) 217 Cal.App.3d 1551, 1563, and federal cases cited therein.) Since plaintiffs have declined the opportunity to amend the complaint, we must assume that they have pleaded the action as favorably as possible. (Truta v. Avis Rent A Car System, Inc., supra, 193 Cal.App.3d at p. 816.)

Accordingly, we conclude that the trial court properly sustained the individual defendants' demurrer to these causes of action.

DISPOSITION

The order of dismissal is affirmed.

NOT TO BE PUBLISHED.

MASTERSON, J.

We concur:

ORTEGA, Acting P. J. VOGEL (Miriam A.), J.

(3)

No. 94-1770

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

MELODY DAVILA, *et al.*,

Petitioners

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

TABLE OF CONTENTS

PAGE(S)

PROCEDURAL POSTURE AND FACTUAL BACKGROUND 3

REASONS FOR DENYING WRIT OF CERTIORARI 8

I. The Unique Procedural Posture of This Case, Including a Stipulation by Counsel to Permit the Court of Appeal to Consider Facts Contained in The Police Report, Make This Case a Poor Candidate for Certiorari Review. 8

II. California Courts, Including the Court of Appeal in This Action, Recognize and Apply Federal Standards for Measuring the Adequacy of A Civil Rights Complaint Brought in State Court. 12

III. Considering the Totality of Facts Before the California Court of Appeal, The Second Amended Complaint was Legally Inadequate Even Under Liberal Pleading Requirements of the Federal Rules of Civil Procedure and Without Any Heightened Pleading Requirement. 14

IV. Apart From the California Court's Finding That Petitioners' Pleaded and Made a Showing of Mere Negligence Rather Than Deliberate Indifference, Its Decision to Affirm Dismissal Was Justified Because of a Lack of Duty Under This Court's Due Process Analysis. 17

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Askanase v. Fatjo,
148 F.R.D. 570 (S.D. Tex. 1993) 15

Bach v. County of Butte,
147 Cal.App.3d 554,
195 Cal.Rptr 268 (1983) 12, 13

Barts v. Jasper,
865 F.2d. 1187 (11th Cir. 1989 7

Brown v. Western Ry. of Ala.,
338 U.S. 294, 70 S.Ct. 105,
94 L.Ed. 100 (1949) 11, 12

Bullock v. City of San Francisco,
221 Cal.App.3d 1032,
271 Cal.Rptr. 44 (1990) 13, 14

Conley v. Gibson,
355 U.S. 41, 78 S.Ct. 99,
2 L.Ed.2d 80 (1957) 15

Davidson v. Cannon,
474 U.S. 344, 106 S.Ct. 668,
88 L.Ed.2d 677 (1986) 16

De Shaney v. Winnebago County Department of Social Services,
489 U.S. 189, 103 L.Ed.2d 249,
109 S.Ct. 998 (1989) 7, 18, 19

Estelle v. Gamble,
429 U.S. 97 (1976) 9

Felder v. Casey,
487 U.S. 131, 108 S.Ct. 2302 (1988) 13

Greene v. Zank,
158 Cal.App.3d 497 (1984) 13

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,
___ U.S. ___, 113 S.Ct. 1160,
112 L.Ed.2d 517 (1993) 10, 15

Moten v. American Linen Supply Co.,
155 F.R.D. 202 (D. Kansas, 1994) 15

Van Truong v. James,
168 Cal.App.3d 833,
215 Cal.Rptr. 33 (1985) 6, 7

Wood v. Ostrander,
879 F.2d 583 (9th Cir. 1989) 6, 7

Youngberg v. Romeo,
457 U.S. 307, 73 L.Ed.2d 28,
102 S.Ct. 2452 (1982) 18

STATUTES:

42 United States Code
§ 1983 . . . . . 2, 3, 15, 16, 19

Federal Rules of Civil Procedure
Rule 8(a) 14, 15
Rule 12(b)(6) 10
Rule 12(c) 10
Rule 56 10

OTHER AUTHORITIES:

R. Stern, et al., *Supreme Court Practice*
(7th Ed. 1993) 193 9

United States Constitution
Fourth Amendment 16
Fourteenth Amendment 16

Rules of the Supreme Court of the United States
Rule 10 8

No. 94-1770

In the

SUPREME COURT OF THE UNITED STATES
October Term 1994

MELODY DAVILA, *et. al,*

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et. al.*,

Respondents.

Respondents respectfully request denial of the Petition for Writ of Certiorari, which seeks review of a decision by the Supreme Court of California not to review an unpublished opinion of the California Court of Appeal.

JURISDICTION

Although the caption to the Petition for Writ of Certiorari lists the County of Los Angeles as a respondent, this is incorrect since the opinion below, to which the writ is directed, does not apply to the County of Los Angeles but only to Michael Rodriguez, Jeffrey Lammers and Michael Dimarzo, who were employees of the County of Los Angeles at the time of the incident giving rise to the underyling civil rights claims.

SUMMARY OF ARGUMENT

The California Court of Appeal applied the correct federal standard for testing the sufficiency of plaintiff's second amended complaint for violation of civil rights, which plaintiffs filed in state court. Pursuant to state procedure, defendants properly filed a demurrer which normally tests the sufficiency of a pleading by the adequacy of factual allegations; however, the Court of Appeal expressly recognized and followed the established rule that federal pleading standards must be used to assess whether a Section 1983 claim has been stated. The unique procedural posture of this case, including a stipulation by counsel at oral argument on appeal, permitting the Court to consider the facts contained within the police report, makes it a poor

candidate for writ of certiorari, if any controversial issues had been raised by Petitioner's application.

PROCEDURAL POSTURE AND FACTUAL BACKGROUND

On March 10, 1990, the decedent was taken into custody for public intoxication by Los Angeles Sheriff's Department patrol deputies. As discussed in more detail below, decedent was later released from the patrol car, subsequently stepped from the curb into traffic and was struck and killed by a passing motor vehicle. Petitioners are the heirs of the decedent, Henry Davila. In a complaint filed January 29, 1991, in the California Superior Court, plaintiffs alleged a state statutory cause of action for wrongful death and civil rights allegations pursuant to 42 U.S.C. § 1983.

Several months later in 1991, defendants County of Los Angeles, Michael Rodriguez, Jeffrey Lammers and Michael Dimarzo, pursuant to state procedure, filed a demurrer to the Complaint, on grounds, *inter alia*, that recklessness was not adequately pleaded as to the civil rights claims. The trial court sustained the demurrer to the wrongful death cause of action against all defendants, without leave to amend, but permitted amendment as to civil rights claims so plaintiffs could allege recklessness by the defendants.

Plaintiffs then filed a first amended complaint, against the individual officers only, on June 17, 1991, alleging state tort and civil rights violations. Once again, plaintiffs neglected to allege that the decedent could not care for himself because he was intoxicated; they also failed to adequately plead recklessness. This time the trial court dismissed the action, giving rise to plaintiffs' first appeal.

The Second Appellate District for the State of California issued an unpublished opinion (attached inadvertently to the Petition for Writ of Certiorari as Apx B-1) remanding to the trial court, and thereby permitted plaintiffs another opportunity to remedy the defective pleading on both wrongful death and civil rights claims. This appellate opinion is significant because it gives rise to the unique procedural posture of this case where, at oral argument, the court encouraged the parties to provide further factual background pertinent to the immunities issues. The court's unpublished opinion records the stipulation of the parties to have the appellate court consider the facts contained within the police report which was officially lodged with the Court of Appeal, following the hearing. (See Petition for Writ of Certiorari, Apx. B-5)

On remand, plaintiffs filed a second amended complaint (attached to the Petition for Writ of Certiorari as Apx. C-1) alleging a state cause of action for wrongful death and civil rights violations by the individual officers only. On May 27, 1993, the trial court sustained with leave to amend, defendant's demurrer on the civil rights claims against the individual officers, since plaintiff's allegations did not

adequately plead deliberate indifference under federal case law. Plaintiffs elected not to file an amended pleading, causing the trial court to dismiss the action, and giving rise to plaintiffs' second appeal to the California Court of Appeal.

The California Court of Appeal had before it plaintiffs' second amended complaint alleging in conclusory terms that the individual officers acted with "deliberate indifference," as well as the stipulated facts (which included the police report setting forth that the decedent asked to be dropped off at a particular location near his home so as to avoid embarrassment which might ensue from decedent's release from a sheriff's patrol car).

The Court of Appeal found, *inter alia*, that under the facts known to the court and the applicable law, the officers detained and released the decedent "pursuant to the discretion which is vested in police officers". (See Petitioner's Supplemental Appendix, Apx-8.) The Court of Appeal examined case law on the issue of whether a duty or special relationship was created by the officers when they arrested and handcuffed the decedent and released him at a location decedent stated was near his home. The Court held that there was a duty of care owed to decedent "for the period he was handcuffed in the patrol car" (See Petitioners' Supplemental Appendix, Supp.Apx-7.) The Court of Appeal found no case law precedent suggesting that defendants had a duty to the decedent after his safe release from custody: "It is obvious from our reading of the cases that there was not definitive precedent on the issue of duty under the circumstances of the instant case." (Please see Petitioners'

Supplemental Appendix, Supp.Apx-6.) However, as to the state law causes of action, the Court found, citing *Van Truong v. James*, 168 Cal.App.3d 833, 835, 215 Cal.Rptr. 33 (1985), that under clearly established case law the actions of the officers were immunized and that "decedent's injuries were sustained as a result of his voluntarily intoxicated state, not because the officers released him." (Please see Petitioners' Supplemental Appendix, Supp.Apx-9.)

The Court expressly recognized that "California courts apply federal law in determining whether a plaintiff has sufficiently pleaded a civil rights violation." (Please see Petitioners' Supplemental Appendix, Supp.Apx-9.) Under the facts known to the court from the first appeal and the stipulated evidence contained in the police report, the Court of Appeal found the pleadings in the second amended complaint to be insufficient and conclusory, particularly with respect to allegations concerning the officers' supposed "deliberate indifference."[1]

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[1] While the Court of Appeal did not expressly base its decision on the doctrine of "qualified immunity", it apparently accepted of the officers' statement in the police report that the decedent requested he be dropped off at the location in question near his home. Given the Court's finding that the decisional law is unclear on whether the officer's owed decedent a duty following their discretionary decision to release decedent from the vehicle, clearly all the elements for supporting "qualified immunity" were present in the view of the Court. In *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) the dissent noted that in cases such as these where officers truly do not create the danger to plaintiff,

Since plaintiff-petitioners declined to amend their second amended complaint after the opportunity was provided to them by the trial court, the Court of Appeal affirmed the trial court dismissal of the complaint following plaintiff's unwillingness (or inability) to follow the instructions of the trial court. (Please see Petitioners' Supp.Apx-10.) The Supreme Court of California "in bank" denied Plaintiffs' Petition for Review (See Petitioners' Apx. A-1).

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liability is precluded under the holding of *DeShaney v. Winnebago County*, 489 U.S. 189, 109 S.Ct. 998 (1989) so that "it is unnecessary to consider whether [defendants] are entitled to a qualified immunity defense, given that the Due Process Claim does not require the State to protect [plaintiff] from her unknown assailant." *Wood* 879 F.2d at 601.

Here, the Court of Appeal expressly found the officers' decision to release was within their discretion and found that the decisional law did not provide "definitive precedent" although *Truong* strongly suggested that there would be no liability in such circumstances. Hence, the burden was, in effect, shifted to plaintiffs who would have to show "the law clearly proscribed the actions the defendant took" *Barts v. Jasper*, 865 F.2d. 1187 (11th Cir. 1989), *cert. denied*. As a consequence, the Court of Appeal therefore found all the elements for "qualified immunity" even if plaintiffs had, *arguendo*, adequately pleaded a Due Process violation.

REASONS FOR DENYING WRIT OF CERTIORARI

I.

The Unique Procedural Posture of This Case, Including a Stipulation by Counsel to Permit the Court of Appeal to Consider Facts Contained in The Police Report, Make This Case a Poor Candidate for Certiorari Review.

It is well established that the United States Supreme Court grants the discretionary Writ of Certiorari "only when there are special and important reasons". Rule 10 of the *Rules of the Supreme Court of the United States*. The court's aim is to resolve conflicts within the lower courts and establish general principles on important legal issues so that lower courts can apply those principles in the great bulk of cases. It is self-evident that where there is a unique procedural posture unlikely to recur, the precedential value of Supreme Court review is lost.

Moreover, as will be argued further below, the California Court of Appeal applied settled California law

holding that a federal standard for review of the adequacy of Petitioners' complaint was appropriate.

> As one commentator notes:
>
> As Justice Stevens once said, "the Court seldom takes a case merely to reaffirm settled law." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (dissent). Certainly, to the extent that a "correct" decision is a restatement of "settled law", review on certiorari becomes patently inappropriate.

See, R. Stern, et al., *Supreme Court Practice* (7th Ed. 1993) 193.

In the case at bar, the unique procedural posture originated because plaintiffs elected to combine state law causes of action with federal civil rights claims against public officials entitled to statutory and common law immunities, in a state court forum. This means that as to the state law causes of action, plaintiffs were required under state law pleading requirements to adequately plead sufficient facts to state a cause of action (fact pleading) while as to the civil rights claims arising from the same factual circumstances, plaintiffs were required only to state facts sufficient to put defendants on notice of the claims against them (notice pleading).

Furthermore, under state law, plaintiffs were required to state facts sufficient to demonstrate the non-applicability of statutory immunities applicable to the state law causes of action. This complex of pleading requirements was brought about by plaintiffs' election of mixed federal and state claims

and plaintiffs' choice of forum and resulted in a demand by the Court of Appeal for more factual specificity which would bear on the state law causes of action and the applicable immunities.

Therefore, the Court of Appeal was not applying "heightened pleading requirements" prohibited by the Supreme Court decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160, 112 L.Ed.2d 517 (1993), when it requested that the parties provide further facts pertinent to the state law causes of action and applicable immunities. In response, to the Court's legitimate appetite for more facts bearing on the state law cause of action and applicable immunities, the parties stipulated to permit the court to receive into evidence and consider the facts contained within the police report, which was subsequently lodged with the Court, following the hearing. (See Petitioner's Appendix, Apx. B-5.)[2]

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[2] Procedurally, this might be viewed as an application of the doctrine of "judicial notice" which permits a court to view facts outside the four corners of the pleading. The Court of Appeal expressly stated in its second decision that "We also consider matters which may be judicially noticed." (See Supp. Apx.-2 in Petitioners' Supplemental Appendix.) However, since the parties *stipulated* to introduction of factual material through the police report the situation might also be seen as a permissible conversion of the demurrer to a Motion for Summary Judgment. State courts within California are permitted this device much as federal courts may convert a 12(b)(6) Motion to Dismiss into a Rule 56 Motion for Summary Judgment. *See*, F.R.Civ.P. 12(c).

Once, having admitted into evidence the facts contained within the police report for purposes of assessing the validity of the state law cause of action and pertinent immunities, those facts could also be considered in a determination of the validity of the civil rights claims. At this point the Court was no longer limited to the facts recited in the four corners of the complaint, pursuant to the stipulation of the parties. In this manner, the Court of Appeal was permitted to consider facts contained within the police report which include a statement by one officer that the decedent, who seemed only mildly impaired, asked for a ride home and then requested he be dropped off at a nearby intersection so that embarrassment would be avoided by his wife seeing him released from the custody of a police vehicle. It is in relation to these facts, ascertained by the Court of Appeal, that it may fairly be said that plaintiff's allegations of "deliberate indifference" are merely conclusory.

As a result, the decision of the California Court of Appeal does not in any fashion frustrate federal law by imposing substantive limitations on Petitioners' rights. Unlike *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949), cited by Petitioners, California pleading rules were not utilized here. Instead, the Court of Appeal expressly recognizing the supremacy of federal law, merely required Petitioners to plead why they satisfied the "deliberate indifference" standard. Despite being given several bites at the apple, Petitioners were unable or unwilling to allege facts demonstrating liability under

federal law. Instead, they desire this Court to permit them to allege mere conclusions, to disregard the facts known by all to be true, and to be allowed to proceed to trial with a patently frivolous case. This they should not be permitted to do.

II.

California Courts, Including the Court of Appeal in This Action, Recognize and Apply Federal Standards for Measuring the Adequacy of A Civil Rights Complaint Brought in State Court.

Petitioners contend that California courts are confused about whether they should apply state standards or federal standards for assessing the adequacy of a civil rights claim brought in the state court forum, citing *Bach v. County of Butte*, 147 Cal.App.3d 554, 195 Cal.Rptr 268 (1983) (See Petitioners' Petitior, page 8). *Bach* did indeed note that California courts had earlier applied state standards for assessment of the acequacy of a civil rights claim brought in state court, but that court squarely held:

> Therefore, in light of *Brown* we hold that the state courts of California should apply federal

> law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer.

Bach, 147 Cal.App.2d 563, 195 Cal.Rptr. 273.

While there may have been some discrepancy on this point prior to the *Bach* decision in 1983, a succession of subsequent California cases have reaffirmed the position taken by *Bach.*[3] In *Bullock v. City of San Francisco*, 221 Cal.App.3d 1032, 271 Cal.Rptr. 44 (1990), the Court stated that:

> 'California courts should apply federal law to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer.' [Greene v. Zank, 158 Cal.App.3d 497 (1984)]

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[3] The *Bach* court held that California courts must apply federal law to measure the adequacy of a civil rights complaint in state court, thus ensuring so far as possible that the same outcome would be reached on this issue whether suit is brought in the federal or state court forum. Therefore it is odd that Petitioners should complain that:

> The general rule articulate [sic] in *Bach* conflicts with this Court's decision in *Felder v. Casey* 487 U.S. 131, 108 S.Ct. 2302 (1988) [prohibiting] different outcomes based solely on whether the claim is filed in state or federal court.

(See Petitioners' Petition for Certiorari, at page 8.]

Bullock, 221 Cal.App.3d 1087, 271 Cal.Rptr. 52.

More importantly, for present purposes, the Court of Appeal in the case at bar expressly recognized and applied this legal position. Citing to *Bullock, supra*, the Court of Appeal stated: "California courts apply federal law in determining whether a plaintiff has sufficiently pleaded a civil rights violation." (See Petitioners' Supplemental Appendix, Apx.-9) Hence, this is not an appropriate case to educate California courts on this point, even if such a conflict within California state courts still existed.

III.

Considering the Totality of Facts Before the California Court of Appeal, The Second Amended Complaint was Legally Inadequate Even Under Liberal Pleading Requirements of the Federal Rules of Civil Procedure and Without Any Heightened Pleading Requirement.

The adequacy of a civil rights complaint, whether brought in state or federal courts, is measured by the pleading requirements established by federal law guided by *Federal Rule of Civil Procedure* 8(a) which requires a "short

and plain statement of the claim ***showing that the pleader is entitled to relief.***" (emphasis added). *Leatherman, supra,* held that in relation to civil rights allegations against municipalities there can be no "heightened pleading requirement" and Rule 8(a) must ordinarily be the guiding light.

However, *Federal Rule of Civil Procedure* 8(a) is not devoid of teeth of its own. The pleader must still show that he or she is "*entitled to relief*" under the substantive law underlying the claimed injury. Indeed, this Court, in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), recognized that an action brought under Section 1983 may be dismissed for failure to state a claim if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Although the complaint need not be factually detailed, nonetheless it "must give the defendant fair notice of what the plaintiff's claim is and the grounds *upon which it rests.*" *Id.*, 355 U.S. at 47 (emphasis added). Consequently, while Rule 8(a) relieves a plaintiff from pleading technicalities under older Code pleading rules, the rule still requires a plaintiff to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory. *See, Moten v. American Linen Supply Co.*, 155 F.R.D. 202, 204 (D. Kansas, 1994). *See also Askanase v. Fatjo,* 148 F.R.D. 570 (S.D. Tex. 1993) (even cross claims which are given additional pleading leeway require factual specificity and more than merely conclusory allegations.)

As a consequence, courts are entitled to demand a sufficient factual basis for a claim, even in a regime of notice pleading. The adequacy of the claim made by the pleader is measured by the requirements of the substantive law underlying the claim.

In the case at bar, Petitioners alleged Section 1983 civil rights violations of Due Process under the Fourth and Fourteenth Amendments to the United States Constitution against individual officers. It is well established that a prerequisite to a successful suit against individual officers requires the pleading and proof of "deliberate indifference" or "recklessness" rather than mere negligence. *See, e.g. Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

Here, while Petitioners alleged in a conclusory fashion that officers acted with "deliberate indifference", the facts pleaded and accepted by the Court of Appeal, show that the officers acted at most with mere negligence, so plaintiffs have failed to make out their constitutional claim. In *Davidson v. Cannon*, *supra,* where prison officials acted negligently or without "due care," this Court affirmed a Third Circuit decision finding no Due Process violation based on mere negligence. In the case at bar, the California Court of Appeal found on the basis of the record before it, including the facts stipulated into evidence at the oral hearing, that the conclusory pleading of "deliberate indifference" could not overcome the clear evidence that the officers had, at most, acted negligently in dropping off the intoxicated decedent at the location he requested near his

home. Clearly a conclusory allegation of "deliberate indifference" will not withstand facts known to the court tending only to support mere negligence.

IV.

Apart From the California Court's Finding That Petitioners' Pleaded and Made a Showing of Mere Negligence Rather Than Deliberate Indifference, Its Decision to Affirm Dismissal Was Justified Because of a Lack of Duty Under This Court's Due Process Analysis.

The California Court of Appeal suggested that while a "special relationship" may have existed while the decedent remained within the patrol car, the relationship terminated once the decedent was dropped off safely at the intersection he stated was near his home. (See Petitioner's Appendix, Supp. Apx-7.) Putting aside Petitioners' failure to state and make a showing of more than mere negligence, and ignoring the availability of a "qualified immunity" defense to the individual officers, the decision of the Court of Appeal was independently justifiable on the basis of this Court's Due

Process jurisprudence following *De Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989).

The *De Shaney* court noted that prior decisions including *Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982), "stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *De Shaney*, 489 U.S. at 199. However, when the state takes temporary custody of an individual and then releases him to the "free world", in no worse position than if the State had not acted at all, the state does not continue as permanent guarantor of the safety of the released individual. This is true even if the state knows of dangers the individual may continue to face in the "free world."

> Petitioners concede that the harms Joshua suffered did not occur while he was in the state's custody, but while he was in the custody of his natural father who was in no sense a state actor. While *the state may have been aware of the dangers that Joshua faced in the free world*, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the state once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no

> worse position than that in which he would have been had it not acted at all; the state does not become the permanent guarantor of an individual's safety by once having offered him shelter.

De Shaney, at 201 (emphasis supplied).

The suggestion by the Court of Appeal that any duty owed by the officers only existed while the decedent was handcuffed in the police car and did not continue after decedent's safe release onto the sidewalk he stated was near his home appears well grounded under the *De Shaney* analysis of Due Process obligation. This reasoning is independent of Petitioners' failure to make a showing on the deliberate indifference requirements which provided the principal basis for the decision of the Court of Appeal. It provides further support for the correctness of the decision of the California Court of Appeal, making it improvident to grant certiorari in this case.

CONCLUSION

The legal uncertainty that may once have existed in California over how to measure the adequacy of Section 1983 pleadings in California courts is not a sufficient basis for an extraordinary review pursuant to Writ of Certiorari, particularly since the Court of Appeal in the underlying case applied the current and correct federal pleadings standard and did not impose a "heightened pleading requirement" on

Petitioners. Even if Petitioners had pointed to a genuine and important legal controversy, the unique procedural posture of the case, including a stipulation by counsel to permit into evidence the contents of the police report, make this case an extremely poor candidate for Certiorari review. The decision is justified because of the California Court's determination that Petitioner can make no showing that Respondents' actions were anything other than merely negligent, and its findings are consistent with the application of the doctrine of qualified immunity and the absence of a duty or special relationship under prevailing Due Process jurisprudence. The Petition for Writ of Certiorari should, therefore, be denied.

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Respectfully submitted,

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